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ABSTRACT

This paper examines the issue of employment discrimination and the position taken by the Government in an attempt to stop discrimination in employment. Presented is a survey of seven appellate cases. Each of them represents a case in which the issue of the adequacy of test validity studies is questioned. In six of the seven cases, the use of tests in hiring was held unlawful on the grounds that the validity study did not produce adequate evidence. The evidence set forth by the court cases supports the proposition that the greater the degree of adverse impact and the smaller the degree to which an employer in fact desegregated a previously segregated work force, the less likely it is that the selection procedure will withstand judicial scrutiny. The implications of these cases for industrial psychologists are briefly discussed. (YRJ)

QUALIFICATIONS AND EQUAL EMPLOYMENT OPPORTUNITY LAW

Presented as Part of a Symposium by David L. Rose [1/]
before the American Psychological Association
Washington, D.C., September 6, 1976

The topic assigned to me was the Government's View of Qualifications and Affirmative Action. I have taken the liberty of changing the assigned topic in two ways. Because I am here speaking for myself, and not for the Government, I have stricken the reference to the "Government's View." In addition I have substituted "Equal Employment Law" for "Affirmative Action," not only because affirmative action means so many different things to different people but also because I feel more comfortable in trying to describe what the law is, than in trying to guess what affirmative action should be.

1/ A.B., Harvard College 1953, c.l.; LLB, Harvard Law School, c.l., 1956. Mr. Rose has been Chief of the Employment Section, Civil Rights Division, U.S. Department of Justice, since October, 1969, and as such has been in charge (subject to the supervision and control of the Assistant Attorney General, Civil Rights Division) of that Department's litigation program to enforce equal employment opportunity law. He is in addition, that Department's staff representative on the Equal Employment Opportunity Coordinating Council, which has developed the proposed Uniform Guidelines on Employee Selection Procedures, 41 Fed. Reg. 29016, et seq.

I have a hypothesis for you today. It is that the courts have and will continue to pay close attention in employment discrimination cases not only to the degree of adverse impact caused by any employment test or other selection procedure, but also to the overall progress with which the employer is making in the jobs in question in terms of hiring groups that have previously been the victims of discrimination. I do not of course claim to be a scientist. But I understand that industrial psychologists are interested in numbers. Accordingly, I intend to support my theory with statistical facts which all are matters of public record.

Some background is necessary. As most of you know Congress passed the Civil Rights Act of 1964 in July of 1964. The equal employment opportunity provisions of that law became effective a year later, in July of 1965. The act generally prohibited discrimination in employment on the grounds of race, color, religion, sex or national origin. With respect to testing it contained the following clause:

> . . . nor shall it be an unlawful employment practice under this title for an employer to give and act upon the results of any professionally developed ability test provided that such test is not designed, intended or used to discriminate because of race, color, sex, or national origin. 2/

For the first several years of Title VII there was disagreement as to whether the act prohibited only racially motivated practices or other practices which on their face were discriminatory or whether it had broader coverage. As most of you know in the landmark decision of Griggs v. Duke Power Company 3/ the Supreme Court held unanimously that the act prohibited not only overt discrimination, but also any neutral practices which perpetuated past discrimination, or which operated to exclude groups previously discriminated against, unless those practices were justified by business necessity. With respect to tests and other selection procedures the Supreme Court held specifically that if the practices had an adverse impact (i.e., operated to exclude blacks or other groups disproportionately)

2/ Sec. 703(h), 42 U.S.C. 2000e-2(h).

3/ 401 U.S. 424.

the employer was obliged to justify the test in terms of business necessity. In short the Supreme Court held that if a selection procedure had a discriminatory racial impact the employer was obliged to validate it.

The Supreme Court's decision in Griggs v. Duke Power Company was rendered on March 8, 1971. Congress adopted the Equal Employment Opportunity Act of 1972 approximately a year later -- on March 24, 1972. That act amended Title VII in several important respects. Among other things it granted the Equal Employment Opportunity Commission the authority to bring suit and it extended the coverage of Title VII to state and local governments. The substantive provisions of Title VII were left largely unchanged. The Committee Reports and other portions of the legislative history discussed the court decisions which had previously been rendered under Title VII and found them to be consistent with Congressional intent. In particular the Supreme Court decision in Griggs v. Duke Power Company was repeatedly cited with approval by the Congress. 4/ The effect of the legislative history was to ratify and approve

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4/ See, e.g., Senate Report No. 92-415, 92nd Cong. 1st. Session, pp. 5, 14-15.

the interpretations of Title VII previously adopted by the Supreme Court in Griggs and in lower court decisions. 5/

The first principle concerning qualifications and equal employment opportunity law is therefore clear and settled. If a selection procedure has an adverse impact (i.e., it operates to exclude racial, ethnic, or sex groups disproportionately) the user must show its validity. Under the law therefore, the qualifications used must be real, not paper or theoretical.

Even if validity is shown however, a second principle has emerged. As Jerry Letwin indicated earlier today, the Supreme Court has ruled in Albemarle Paper Co. v. Moody, that even if validity is shown it remains open for the complaining party to prove that other tests or selection procedures without a similar adverse racial impact would also serve the employer's legitimate needs. 6/

5/ The Conference Report stated (118 Cong. Rec. 7166): "In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII. Quoted and relied upon by the Supreme Court in Franks v. Bowman Transportation Co. U.S. , 44 U.S.L.W. 4356 (S. Ct. No. 74-728, March 24, 1976), Slip Op. p. 16-17, fn. 21.

6/ 422 U.S., 405, 425.

The equal employment opportunity law has introduced into the field of testing the concern of the three branches of Government, Executive, Legislative, and Judicial that the pursuit of excellence not result in discrimination against blacks, Spanish-surnamed Americans or women. Industrial psychologists could previously assume that virtually any degree of validity warranted the use of a test. The only countervailing factor was the cost of administering the test. The civil rights laws have changed that situation. Now any claims for validation must be measured against the extent to which the selection procedure operates to exclude (i.e., perpetuates the effects of past discrimination).

It is my theory that those in the field of industrial psychology should measure and study and consider the extent of adverse impact, and should consider that factor in making reports and recommendations to users. It is further my theory that the appellate courts will give great weight to the extent of adverse impact, and the extent to which the particular employer has been or has not been perpetuating the effects of past discrimination in its employment

practices in determining whether a particular selection procedure is valid and lawful.

There are several hundred federal judges in this country. They are, of course, from widely diverse backgrounds and have differing views and abilities. As a group, however, they are highly pragmatic and broadly experienced. They have been around long enough to be highly skeptical. They are interested in what is actually happening and in who and how many persons are being hired, promoted, demoted, etc. If a test operates to perpetuate past discrimination and to prevent an employer from desegregating a previously segregated job structure, it is my view that the judges are likely to be skeptical of the evidence of validity and to test it very carefully. Where there is substantially no adverse impact the equal employment opportunity law is not even involved. But if there is some adverse impact, but the test does not substantially interfere with equal employment opportunity objectives, it is my theory that the courts will be less likely to scrutinize the evidence carefully and will be more likely to hold that the validity evidence is sufficient.

I have conducted a survey of seven appellate cases. In each of them the issue of the adequacy of the validity study was one of the principal issues before the appellate court. In six the use of the test was held unlawful on the grounds that the validity study did not produce adequate evidence. In one of the cases the study was held to be valid and the use of the test held lawful. I will summarize for you what I found, based on the facts set forth in the judicial opinions or the records.

In the first case [7/] the employer required passing of three tests, the Bennett Mechanical, the PTI Numerical and the PTI Verbal. The passing rates under those three tests was as follows:

	White	Black
Bennett	99%	62.5%
PTI Numerical	99%	57%
PTI Verbal	99%	70%

Until suit was filed all blacks hired into collective bargaining jobs were hired as laborers for which none

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7/ United States v. Georgia Power Company, 474 F.2d 906 (5th Cir. 1973).

of the above tests was required. By contrast, 85% of the new white employees were hired into the higher paying, higher opportunity, traditionally white jobs for which the tests were required. The court held that the validity study was inadequate and that the tests were unlawful.

In the second case [8] the test was used for selection of fire fighters and purported to measure vocabulary, reading, and knowledge of mechanics, mathematics, New York City Government and current events. [9] Although blacks and Hispanics constituted 32% of the population of New York City, they made up only 5% of the Fire Department. [10] Although 11.5% of the applicants were black or Hispanic, only 5.6% of those who passed the test were black or Hispanic. [11] Moreover of those applicants who rated in the top 62%, only 3.2% were black or Hispanic. [12] In other words black or Hispanic persons had less than one-third

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8/ Vulcan Society of New York v. Civil Service Commission, 490 F.2d, 387 (2nd Cir. 1973).

9/ 360 F. Supp. at 1268.

10/ 360 F. Supp. at 1269.

11/ 490 F. 2d at 392.

12/ 360 F. Supp. at 1269.

the chance of being selected than a white non-Spanish candidate. The court held that the validation study was inadequate and that the use of the test was unlawful.

In the third case [13] the employer was using the Public Personnel Association test of vocabularly, arithmetic and general information for selecting police officers. The passing rate on the test was 58% for white applicants and 17% for black applicants. [14] While blacks and Hispanics constituted approximately 25% of the workforce of the City they constituted only 3.6% of the Police Department. The court held the evidence of validity to be inadequate and held the use of the test to be unlawful.

The fourth case in our study concerned the selection of fire fighters in Massachusetts. [15] The test administered in that case concerned knowledge of material contained in a firefighters manual. The

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13/ Bridgeport Guardians v. Civil Service Commission, 482 F.2d 1333 (2nd Cir. 1973).

14/ 354 F. Supp. 778, 784.

15/ Boston Chapter NAACP v. Beecher, 504 F.2d 1017 (1st Cir., 1974), certiorari denied 421 U.S. 910.

passing rate for whites was 56%, and for blacks and Hispanics was 39%. Although the black and Hispanic population of Boston was 23%, less than 1% of the uniformed personnel in the Fire Department was black or Hispanic. Similarly although Springfield was 12% black and Hispanic, less than 0.2% of its Fire Department was black or Hispanic. The court held that the validity evidence was not adequate and that the continued use of the test was unlawful.

The fifth case we have surveyed [16] concerned a paper company in Pine Bluff, Jefferson County, Arkansas. That county was 30% black. Employment at the paper mill had been totally segregated on the basis of race until 1962. At the time of the law suit the employer had 1,443 employees of whom 118 (or 8.8%) were black. [17] The use of tests was challenged only for maintenance jobs. There were 255 skilled craft employees in such maintenance jobs, of which there were only 2 blacks (less than 1%) and those blacks were apprentices. [18] The employer used both the

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16/ Rogers v. Int'l Paper Co., 510 F.2d, 1340 (8th Cir. 1975).

17/ 510 F.2d at 1343

18/ 510 F.2d at 1344.

Wonderlic and Bennett tests for the selection of persons in such maintenance jobs. Although there was no direct evidence of what the adverse impact of those tests was, the court held that there was sufficient showing of adverse impact and that the evidence of validity was inadequate, and that the use of those tests was therefore unlawful.

In the sixth case surveyed [19] the employer used the Wonderlic and Bennett tets for the selection of the employees. The Court commented that:

> years of discrimination has insured that all or nearly all the upper level [production] were white. [20]

Thus the 105 persons who were involved in the validity study, only four were black. The evidence showed that 95 or 96% of the white applicants passed the tests while the passing rate for blacks was either 67% or 44% [21]

19/ Albemarle v. Moody, 422 U.S. 405.

20/ 422 U.S. at 435.

21/ See 472 F.2d., 134, 138. A study showed that the passing rate for whites nationally was 96%, while the passing rate for blacks was 64%. The brief of the plaintiffs stated that the 95% of the white persons taking the test at the plant passed, while only 44% of such blacks passed.

The court held that the evidence of validity was not adequate and that the continued use of tests was unlawful.

The last case surveyed also involved selection of police officers.[22] A test of verbal skills was used. The passing rate on that test was 87% for white applicants and 43% for black applicants.[23] Approximately 33% of the white applicants were actually hired whereas only 17% of the black applicants were hired. Thus the evidence of adverse impact in terms of passing the test was similar to that of cases discussed above. But the record also showed that 44% of the new police officer recruits had been black and that blacks constituted approximately 44% of the total police officer workforce.[24] Moreover of the persons hired from January 1, 1970 to

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22/ Washington v. Davis, ___U.S.___, 44 U.S. L.W. 4789 (S. Ct. No. 74-1492, June 7, 1976).

23/ 512 F.2d at 958.

24/ Slip. Op. p. 4.

September 1970, which was the latest period of time for which statistics were available before the case was heard, blacks comprised 72% of those taking the test, 56% of those passing the test and 55% of those actually reporting for work. 25/ The court held that the evidence of validity was sufficient and that the use of the test was therefore lawful.

I don't want to overstate the evidence that I presented to you here today. I am not a scientist, and my sampling of cases was not based on any statistical or other scientific principles. Moreover there were many factors that entered into the courts' decisions other than the degree of adverse impact and the degree to which the employers were or were not taking effective steps to provde for equal employment opportunity. Moreover, I don't want to overstate my theory. If an employer can produce persuasive evidence of validity, the court may well accept it, regardless of the degree of adverse impact of the test.

25/ 512 F.2d at 961 fn. 32.

Nevertheless, I believe that the evidence set forth above does support the proposition that the greater the degree of adverse impact and the smaller the degree to which an employer in fact desegregated a previously segregated workforce, the less likely it is that the selection procedure will withstand judicial scrutiny.

What is the impact for the practicing psychologist?

If you can develop or devise valid tests for police, fire or other job classifications which are populous and those tests have no adverse impact, by all means copyright the instrument or try to secure a patent on it, for you may well make millions of dollars. Such a selection instrument would be an answer to many, many problems.

Even if you can't find such an instrument, try to develop and validate instruments other than traditional verbal tests, that have had a very severe impact on minorities. Instruments which have relatively little adverse impact are both likely to survive the initial challenge in court and if they do survive that challenge they are less likely to be met with an alternative selection device which has a lower adverse impact.

In any event, when you publish research papers, or manuals or make a report for potential users, include the extent of adverse impact, so that the user can make intelligent decisions. Include the adverse impact information in detail in the body of the report; and in a summary of the report where it is likely to be read. For it is only by considering the degree of the adverse impact that intelligent choices can be made concerning the use of qualifications, in light of equal employment opportunity law.